

AUCTIONEERS OF REAL ESTATE

When persons who provide auction services become involved in **real estate sales**, questions arise as to whether or not that auctioneer needs to be licensed as a real estate broker or salesperson.

Idaho law does require *every auctioneer* to obtain an auctioneer's license from their county treasurer. For an annual fee, this auctioneer's license is valid for sales in any county of Idaho. (Section 63-2304, Idaho Code). However, an auctioneer's particular services and business activities in the sale of real estate may well require real estate licensure also.

The basic test is: Are the activities being performed by the auction company or auctioneer identified in Section 54-2004(29), Idaho Code, as activities requiring a real estate license? While the specific answer to this question can only be determined on a case by case basis, here are some common questions and answers:

1. Is the taking of a "consignment" to sell real property at auction a licensed brokerage activity?
Most likely, yes. Procuring of prospects to list or sell real property for compensation is an activity requiring licensure.
 2. Is the act **alone** of calling the sale at auction one requiring a real estate license?
No.
 3. Is a one-time sale by auction, i.e., the sale of one property in a single transaction, all right without having a real estate license?
*Only if conducted **exactly** according to the statutory exemption in Section 54-2003(1)(c), Idaho Code, which is the exception for the sale of a single property in a single transaction pursuant to a power of attorney. This **exception**, while valid, is very limited and may not be relied on in conducting any other regular or frequent or even occasional auction business.*
 4. Do floor "spotters" at the real estate auction need to be licensed?
If the activity of the person is limited to pointing out bidders to the auctioneer, no.
 5. Can the unlicensed auctioneer advertise upcoming real estate auctions alone, without associating with and naming a licensed broker?
See answers #2 and #3 above. While possible, the more activities and services performed by an auctioneer in assisting with and facilitating the sale of real property, the more likely that auctioneer is moving into licensed brokerage activity. An auctioneer must not be holding out to the public that he or she is in any way providing any licensed real estate services.
 6. Can a licensed real estate broker split the brokerage commission with an unlicensed
- Idaho Real Estate Commission

auctioneer upon sale at auction?

No. An unlicensed auctioneer can be paid only for specific real estate services rendered, such as calling the auction. The fee just cannot be a split of the brokerage commission or paid from the broker to the unlicensed auctioneer. For example, a broker or seller may purchase advertising on radio or television to market a property. The payment is only for the actual advertising service rendered. While the amount of payment given to an auctioneer can be a percentage of the sales price, it is critical that the seller enter separate contractual obligations - one with the auctioneer and one with the licensed broker, delineating their separate services provided and the compensation therefor. Section 54-2054(2), Idaho Code, states:

“Fee-splitting with unlicensed persons prohibited. Unless otherwise allowed by statute or rule, a real estate broker, associate broker or salesperson licensed in the state of Idaho shall not pay any part or share of a commission, fee or compensation received in the licensee's capacity as such in a regulated real estate transaction to any person who is not actively licensed as a real estate broker in Idaho or in another state or jurisdiction. The Idaho broker making the payment to another licensed person is responsible for verifying the active licensed status of the receiving broker. This section shall not prohibit payment of a part or share of a commission, fee or compensation by the broker to a legal business entity, all of whose shareholders, members or other persons having a similar ownership interest are active real estate licensees. An Idaho licensee may pay any part or share of a commission, fee or compensation received, directly to the buyer or seller in the real estate transaction. However, no commission, fee or compensation may be split with any party to the transaction in a manner which would directly or indirectly create a double contract, as defined in this chapter or which would otherwise mislead any broker, lender, title company or government agency involved in the transaction regarding the source of funds used to complete the real estate transaction or regarding the financial resources or obligations of the buyer.”

7. If an auctioneer has a license as a real estate salesperson, can he or she act as an auctioneer and receive commissions without the involvement of his or her broker?

Generally, no. Any licensed activities conducted by a salesperson are legally possible only through the license of that person's broker. Technically, a licensee who wishes to merely provide "talent" and call an auction, if not holding himself or herself out as a licensee in any way, may engage in this activity. However, the permission and consent of all brokers should be obtained!! This type of practice is one fraught with hazards and conflicts and is NOT recommended or advised.

8. Is the recruitment of potential buyers of real property to attend an auction considered brokerage activity?

"Recruiting" prospects or "assist(ing) in the procuring of..."prospects, for compensation, is brokerage activity requiring a real estate license. Of course, mere execution of clerical tasks or running advertisements alone is not licensed activity. Refer to Guideline #17 on the Use of Unlicensed Assistants and Office Staff for additional guidance.

9. If an auction company is a licensed real estate brokerage, must all advertising follow license law and rules?

If the auction company is engaged in licensed activity involving the sale or auction of real property, yes. If the public believes the licensee is acting in a licensed capacity, and/or the licensee is holding himself or herself out as acting in a capacity of a licensee, then, yes, all law and rules of the Idaho Real Estate Commission will apply to that licensed activity, whether or not an auction.

10. What about agency? Whom does the auctioneer or auction company represent and how must this issue be disclosed before, during and after the sale?

*All fees except for non-licensed auction services (calling the action, advertising, set-up, etc.) should be directed to real estate agent **not** auctioneer. If the auctioneer is also a real estate licensee, he or she is bound by all license law including disclosures required by the Brokerage Representation Act. It is the responsibility of the licensee to hand out a blue brochure at first substantial business contact. Any real estate licensee associating with an auctioneer to sell a property should explain his or her own agency or nonagency position prior to beginning the auction, and the fact that the auctioneer is not a real estate licensee.*

11. What is a "buyer's premium" and who receives it?

A buyer's premium is a fee, usually a percentage of the bid price, which is paid with and added onto the successful bid amount. Who receives this fee? This depends on the written contractual arrangement between the licensees and/or auctioneer, and the buyer. Refer to question #6 for caveats.

12. Who is the responsible broker in an auction sale?

*Either broker, listing or selling, can be the responsible broker. However, one **must** be identified in a licensed transaction.*

13. Can a licensee auction properties listed by another real estate company?

Yes, in theory. However, it must be pursuant to agreement between the brokers in writing, and the responsibilities of each brokerage and the licensee should be carefully spelled out, including identification of responsible broker.

14. Must potential buyers give any consideration up front in order to attend an auction of real property? If so, what is the responsibility of any affiliated licensee or broker?

*Auctioneers structure real estate auctions differently. However, if **any** type of consideration is "held" by or on behalf of the parties conducting the auction of real property involving*

licensed activity, the licensee will be expected to fully account for the consideration received, according to license law and rules.

15. What are some of the other issues to consider in auction of real estate?

Be aware of the fact that bidders coming to an auction without a real estate licensee, or those who preregister through a licensee, may already have some kind of buyer broker contract and some type of commission or fee obligation to a licensee.

In conclusion, the final determination on the necessity of licensure must be made on the basis of Section 54-2004(29), Idaho Code, defining a real estate broker:

““Real estate broker” means and includes:

(a) Any person other than a real estate salesperson, who, directly or indirectly, while acting for another, for compensation or a promise or an expectation thereof, engages in any of the following: sells, lists, buys, or negotiates, or offers to sell, list, buy or negotiate the purchase, sale, option or exchange of real estate or any interest therein or business opportunity or interest therein for others.

(b) Any actively licensed broker while, directly or indirectly, acting on the broker's own behalf;

(c) Any person who represents to the public that the person is engaged in any of the above activities;

(d) Any person who directly or indirectly engages in, directs, or takes any part in the procuring of prospects, or in the negotiating or closing of any transaction which does or is calculated to result in any of the acts above set forth.

(e) A dealer in options as defined in this section.”

If any person is engaged, whether or not through an auction mechanism, in licensed real estate activity in the state of Idaho, a real estate broker's license is required.